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THE EARLY HISTORY OF THE CORPORATION IN ENGLAND

I

OURS is a time of deep question about the state.¹ Theories of corporate personality have challenged in decisive fashion its proud claim to preëminence.² Its character of uniqueness seems hardly to have survived the acid test of skeptical inquiry. The groups it has claimed to control seem, often enough, to lead a life no less full and splendid than its own. The loyalty they can command, the fear they may inspire, are near enough to its own to seek comparison with it. Yet dogmas that are none the less fundamental because they are hardly old still haunt our speculations. It is barely a century and a half since Blackstone asserted in his emphatic fashion the right of the state to condition and control all corporate existence.³ Less than three centuries have elapsed since a civil war shocked the timid Hobbes⁴ into a repetition of Richard of Devizes' anger at the danger of group-persons.⁵ We perhaps too little realize that a long history lies behind Blackstone's incisive sentences; nor is the contemptuous phrasing of Hobbes an accurate index to the English attitude. For, as Maitland has pointed out,⁶ few countries have enjoyed a richer variety of group-life. Yet we have hardly come to ask the fundamental questions that richness suggests. A history of English state theory has still to be written.⁷ We have still to work out in detail the

¹ Cf. BARKER, ENGLISH POLITICAL THOUGHT FROM HERBERT SPENCER TO TO-DAY, 175 ff., and BURNS, THE MORALITY OF NATIONS, *passim*.

² Cf. E. Barker in the POLITICAL QUARTERLY for February, 1915; FIGGIS, CHURCHES IN THE MODERN STATE, and SALEILLES, DE LA PERSONNALITÉ JURIDIQUE, 41, 356, 364, 463-64, 533, 619.

³ 1 COMM. 472.

⁴ LEVIATHAN, Bk. II, c. 29. For his timidity, cf. CROOM ROBERTSON'S LIFE, 52.

⁵ RICHARD OF DEVIZES' CHRONICLE, 416. Cf. 1 STUBBS, CONSTIT. HIST., 6 ed., 455.

⁶ Cf. Maitland's Introduction to GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE, xxxvi.

⁷ Though Maitland has indicated the lines on which such a history should be written. 3 COLL. PAPERS, 210-70.

lines of their thought as to its juridical nature and of its relation to those groups of which they were so dramatically prodigal. Englishmen are a practical race, and they had discovered the benefits of fellowship long before they speculated upon their nature. Orcy of Dorsetshire had built for his brethren a gild-house long before the stern hand of the Norman conqueror had begun to effect the centralization of law;⁸ and the benefits of meat and drink in goodly fellowship were not unknown in Anglo-Saxon Cambridge.⁹

But where men meet to eat and drink and, mayhap, to pray, the subtleties involved in corporate existence hardly seem to emerge. *Communitas*, it is true enough, is the key to early English history; but it is a dangerous and ambiguous word. "It swallows up," as Maitland has happily remarked,¹⁰ "both the corporation and the group of coöwners." That, indeed, is intelligible enough; for in the nineteenth century a great Lord Chancellor could still be puzzled about the nature of corporate ownership.¹¹ The abstractions of early jurisprudence are post-conquestual in origin; and we may even doubt whether the early communalism which has so much affected the economic speculation of our time is not in fact more truly individualist than we care to admit.¹² We dare not base our speculations upon the evidence anterior to the time when the iron hand of Norman William fashioned a conquered kingdom to his own desire. Of corporateness we shall speak with some skepticism, though we shall recognize that its roots are there. For the court rolls from which our main knowledge of internal organization is drawn date only from the end of the thirteenth century; the records of the King's Court are continuous only after the twelfth. Our earlier knowledge is rather of fields and farming methods, of taxation and military service, than of judicial or political unification. And where there is so dangerous an economy of words, our footsteps must needs go slowly.

⁸ CODEX DIP. (ed. Kemble), No. DCCCCXLII.

⁹ I KEMBLE, SAXONS IN ENG., 513. On the Anglo-Saxon gilds generally, see I GROSS, GILD MERCHANT, 174-91. Gneist has warned us against overestimating their importance. I VERWALT, 139.

¹⁰ TOWNSHIP AND BOROUGH, 12.

¹¹ Cf. Eldon, L. C., in *Lloyd v. Loaring*, 6 Ves. 773, 776-77 (1802).

¹² Cf. MAITLAND, DOMESDAY BOOK AND BEYOND, 342 ff. On the other hand Professor Vinogradoff stands by the older conception. GROWTH OF THE MANOR, 18 ff., 150.

II

Yet some sort of guesswork we may adventure. If corporateness be held in the balance the basis of it may at any rate be discovered. The theory of possession — the later turning point in corporate history — here helps us but little. It is to men that the land belongs. Our Anglo-Saxon village is full of freeholders.¹³ The men who drew up Domesday Book were not very certain whether St. Peter owns his church, or the priest who cares for it.¹⁴ The church will indeed hold land; and we may perhaps see therein a significant effort after a natural personification. Yet we shall put our trust in the mysticism of a superstitious time rather than the advanced ideas of an inquiring jurisprudence.¹⁵ The land of England, of a certainty, is the king's, for William knew too well the dangers of continental feudalism to submit himself to its conflicts of allegiance.¹⁶ It is evidence enough that a corporate kingdom is not yet attained, for William at least is stout flesh and blood, and what he calls his own he uses for his purposes.¹⁷

Yet a certain attempt at noteworthy unification we deem not wanting. England is divided into townships; and we shall exaggerate the automatism of medieval life if we believe that its affairs went of themselves. A township court it seems clear that we must have.¹⁸ That court will pass by-laws,¹⁹ and, if need be, enforce them.²⁰ There was joint liability in taxation,²¹ for the separate collection of geld from each individual was a task no administration could then have undertaken.²² The village will grow and divide

¹³ This is of course the whole point of the second essay in MAITLAND, *DOMESDAY BOOK AND BEYOND*. Cf. especially pp. 318 ff. It is interesting to note the kindred ideas of continental historians. Cf. especially 2 FLACH, *LES ORIGINES DE L'ANCIENNE FRANCE*, 45, and Dargun, "Ursprung des Eigenthums," 5 *ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT*, 55.

¹⁴ 1 POLLOCK & MAITLAND, 2 ed., 498-500.

¹⁵ Cf. 3 GIERKE, *DEUTSCHE GENOSSENSCHAFTSRECHT*, 195.

¹⁶ 1 STUBBS, *CONSTIT. HIST.*, 6 ed., 290.

¹⁷ Cf. 3 MAITLAND, *COLL. PAPERS*, 246. "All lands were his lands, and we must be careful not to read a trusteeship for the nation into our medieval documents."

¹⁸ Cf. VINOGRADOFF, *GROWTH OF THE MANOR*, 194.

¹⁹ Cf. *NORTHUMBERLAND ASSIZE ROLL* (Surtees Soc., vol. 88), 45.

²⁰ Cf. MASSINGBERD, *COURT ROLLS OF INGOLDMELLS*, 44; 1 P. & M., 2 ed., 613.

²¹ Cf. ROT. HUND., I, 6; II, 8, etc.

²² Hence Maitland's brilliant but untenable theory of the manor. *DOMESDAY BOOK AND BEYOND*, 107-28.

into parts;²³ surely the fact of division connotes the recognition of significant difference. The village is a police unit, and it will sometimes struggle against a forcible extinction.²⁴ It is of real importance that our great geld-book should write of local duties and local privileges in township terms.²⁵ The vill that farms its own dues has a healthy sense of its own individuality;²⁶ and the men who could hold and sell their land "*communiter*" we may not easily pass by.²⁷ Nor dare we minimize a waste land which, however vaguely, is yet the possession of the community.²⁸

Admittedly this is no proof of formal corporateness; it is doubtful if your Anglo-Saxon peasant, even if he be lettered monk, would have grasped the transition from *communa* to *universitas*. But no one who looks at this evidence of an action which, whatever it is, is yet not individual, can fail to discern a soil which seems to promise fairly for the growth of abstract ideas. Land that is somebody's land may soon, and easily, become the land of some body. Men who act in union will come rapidly to regard themselves as an unit. Local delimitation will make for the growth of separatism. The men of Trumpington will somehow partake of its character. What that character is they may not as yet speculate; but the basis of speculation lies ready to their hand.

Whatever skepticism we may cherish as to townships, some vague sort of corporate character we may not take from hundreds and from counties. "The 'county,'" wrote Maitland,²⁹ "is not a mere stretch of land . . . it is an organized body of men; it is a *communitas*." In truth that organized character is little short of an amazing thing. Devonshire boasted a common seal at the time of the first Edward;³⁰ and comital grants seem to fall no less trippingly from the pen of needy John Lackland than when boroughs

²³ DOMESDAY BOOK AND BEYOND, 14 ff. For a different view, cf. 2 MAITLAND, COLL. PAPERS, 84-86.

²⁴ MAITLAND, PLEAS OF GLOUCESTER, Pl. 157. VINOGRADOFF, ENGLISH SOCIETY IN THE ELEVENTH CENTURY, 216.

²⁵ Cf. 1 DOMESDAY BOOK 181 d (Frome), 275 b (Wyaston).

²⁶ Cf. 1 SELECT PLEAS IN MANORIAL COURTS (Selden Soc.), 172 (Brightwaltham).

²⁷ 1 DOMESDAY BOOK 213 d (Goldington). On the self-governing character of the medieval township the tenth appendix of Professor Vinogradoff's "English Society in the Eleventh Century" is an interesting balance to Maitland's skepticism.

²⁸ 2 GROSS, *op. cit.*, 122.

²⁹ 1 P. & M., 2 ed., 534.

³⁰ *Ibid.*, 535.

were the subject of his corrupt donations.³¹ The county can be fined; and it seems like enough that it kept a common purse against such misfortune.³² It will defend itself and hire a champion to the purpose.³³ It has a court which is thoroughly representative in character. It seems to make by-laws;³⁴ and it is a natural unit of parliamentary representation. And if the hundred has failed to advance so far, the fine for *murdrum* denotes an early unification; and a clause in the Statute of Winchester shows us that the recognition of its value remains at least to the close of the early middle ages.³⁵ The hundred has its court; nor does it evade the financial censure so beloved of the Angevin kings.³⁶ There is even some prospect that a property in land may not have been lacking to it.³⁷ So near, in truth, to corporateness are these units of administration that within a century and a half its absence gave deep cause for reflection to a chief justice of England.³⁸

Most striking of all we find those villis which have gone beyond the stage of villadom and attained burghality. Wherein lay the secret of that transition we may not now speculate; nor dare we venture a guess as to the time of its beginning.³⁹ For us the important point is rather what was in the minds of those who administered the king's law when they spoke of boroughs. It is unquestionable that to the scribes of Domesday Book the borough is a piece of land like shire and manor and hundred;⁴⁰ yet in one curious passage the writer seems to draw a vivid distinction between the power of personality the county may have and that of the town. He will allow the shire to speak for itself; but the men in Huntingdon he seems to conceive of as in no sense organically one.⁴¹ The borough

³¹ ROT. CHART. 122, 132. Maitland has noted that as late as 17 EDW. II an attempt was made to indict the county. 1 *loc. cit.*, 355.

³² MADOX, HIST. OF EXCHEQUER (ed. of 1711), 386.

³³ 1 P. & M., 2 ed., 537.

³⁴ *Ibid.*, 555, n. 2.

³⁵ STUBBS, SELECT CHARTERS (ed. Davis), 467.

³⁶ 1 STUBBS, CONSTIT. HIST., 6 ed., 430.

³⁷ MAITLAND, DOMESDAY BOOK AND BEYOND, 355, n. 2.

³⁸ See the opinion of Kenyon, C. J., in *Russell v. Men of Devon*, 2 T. R. 667, 672 (1788).

³⁹ All discussion of this problem must now start with Maitland's famous chapter in DOMESDAY BOOK AND BEYOND, 172-219, as checked by Professor Tait in 12 ENG. HIST. REV. 776. Mr. Ballard has fortified Maitland's theory, perhaps a little too emphatically, in his DOMESDAY BOROUGHES.

⁴⁰ Cf. 1 DOMESDAY BOOK 132 a (Hertford), 3 a (Sandwich).

⁴¹ 1 DOMESDAY BOOK 208 a.

is a piece of land and to its corporateness, before the Conquest at least, seems lacking. There are men there, it is true enough; and Henry I will grant to the men of English Cambridge that the barges shall be nowhere loaded save at their port.⁴² It is in a similar sense that his grandson speaks.⁴³ They talk of living men, and the borough seems not yet to have attained the abstract character implied in corporateness. Yet soon a different language will be spoken. When the good burgesses of Okehampton sell their land they will pay to lord and reeve, but to the borough as well;⁴⁴ and the drinking that the friendly men of Whitby demanded implies the possession of a common purse.⁴⁵ We can see clearly enough how men's thoughts move toward the idea of the borough as an entity. Bristol in 1188 had already an interest distinct from that of its citizens;⁴⁶ but such nice metaphysical differences puzzled the good draftsman of Dublin when he copied the Bristol charter, and he hesitated to make the bridge from an intelligible plurality of citizens to the difficulty of a singular city.⁴⁷ Bit by bit what it was at first natural to attribute to the men of the borough the borough itself will come to possess; so that by the reign of King John it has become natural for that reckless prodigal to cast about his free boroughs and their rights.⁴⁸ Magna Carta itself personifies a city of London to which rights have been annexed.⁴⁹ Loshwithiel may allow a stranger to keep its tavern.⁵⁰ Northampton will elect its reeve and coroner;⁵¹ Shrewsbury,⁵² Ipswich,⁵³ and Gloucester⁵⁴ will follow that fascinating example. A town from which its citizens may take "common counsel" has a suggestive group-quality about it. The city of Worcester paid forty marks to the aid Henry II collected in 1177;⁵⁵ and when Lion-hearted

⁴² MAITLAND, CAMBRIDGE BOROUGH CHARTERS, 2.

⁴³ 1 RECORDS OF NOTTINGHAM (Stevenson), 2.

⁴⁴ 1 FRASER, CONTESTED ELECTIONS, 82.

⁴⁵ 1 WHITBY, CART. (Surtees Soc., vol. 69), 211.

⁴⁶ See BICKLEY, LITTLE RED BOOK, where the charter is reproduced.

⁴⁷ HIST. & MUN. DOC. IRELAND (Rolls Ser.), 2.

⁴⁸ See his charter to Lynn in ROT. CHART. 118; to Dunwich in *ibid.*, 159; to Stafford in 1 CAL. CHARTER ROLLS 71.

⁴⁹ MAGNA CARTA, c. 9.

⁵⁰ REP. HIST. MSS. COM., 1901, pt. i, 328.

⁵¹ 1 RECORDS, 25, 31.

⁵² ROT. CHART. 46.

⁵⁴ ROT. CHART. 56.

⁵³ ROT. CHART. 153.

⁵⁵ PIPE ROLL 23 HEN. II, 67.

William grants to his "burgh and burgesses" of Ayr five pennyworth of land, the reality of the distinction seems incapable of disproof.⁵⁶ What was that *communa* of the city of Oxford which in 1214 had a common purse wherewith it could pay penance for the murder of poor scholars?⁵⁷

We must not overstress this communalism, for in truth it is ambiguous enough. What we shall recognize is the undoubted fact that the draftsman of the twelfth century see here, however vaguely, the terms of corporate liability and are striving forward to express it. It is an effort made unconsciously and it is an effort rarely sustained. The transition from "borough" to "burgesses" is too easy for the clerk not to make it with great ease. But the materials of change are there. A mercantile center the borough is to become with its guilds and fraternities. It will send twelve men to the assize and two men to the parliament.⁵⁸ It has a power of self-direction which is earlier and more real than that of all other communities in England. But in these early days it is an administrative area rather than a corporate personality.⁵⁹ It retains much of its old rural character. Its heterogeneous tenure reminds it that a sense of corporate ownership is not yet at hand. It has still to fight its way to independence, and it will find that the road thereto lies through the coffers of the king. The time when it will become a new type of community dates rather from the age when kings will sell somewhat easily their liberties that they may establish their sovereignty with the profits so gained. The *liber burgus* in a full and corporate sense is perhaps the offspring of parliamentary representation.⁶⁰ What is at this time significant is the fact that the desire for unity and the privileges that give it form come from below. There is no imposition from above. The purchase price stands for a common aim. The men of London who took the county of Middlesex to farm⁶¹ had a fine sense of collective effort. The oath they would take within sixty years may derive from foreign models;⁶² but it stands for the growth of a spirit which will not find

⁵⁶ See CHARTERS OF AYR, I.

⁵⁷ WOOD, HIST. AND ANTIQ. OF THE UNIV. OF OXFORD, s. a. 1214.

⁵⁸ Cf. 1 P. & M., 2 ed., 634.

⁵⁹ *Ibid.*, 636.

⁶⁰ Cf. *Ibid.*, 640-41.

⁶¹ STUBBS, SELECT CHARTERS (ed. Davis), 129.

⁶² STUBBS, SELECT CHARTERS (ed. Davis), 245; 1 STUBBS, CONSTIT. HIST., 6 ed., 704-07; ROUND, COMMUNE OF LONDON, 235.

it difficult to take corporate form. That of which the early history of the English boroughs will leave a firm impression is the fact that not even the pressure of medieval centralization can hinder their growth. They will remain the centers of commerce. Their fairs, their markets, the protection they can offer to merchants, the immunities they have purchased — all these foster in them that precious spirit of localism which gives to each borough its own unique history. They broke the hard cake of feudal custom. They were to cast off the control of their lord. There was in them the potentiality of spontaneous development which is the fundamental basis of corporate life. That which they are no royal grant nor lordly privilege has made. But what they are to become depends on the powers of other men. The problem of their future is bound up with those powers.

III

Yet what is striking is the failure — the borough and the church apart — of these groups of men to pass from collectivism to a corporate character. The one step which seems to lie most readily before them is the one step they do not take. Manors and vills, counties and hundreds, these lose bit by bit the fine sense of unified separatism which had distinguished them. Soon after the Angevin dynasty has established itself we cease to expect such development. Individuals become the controlling factors in their history. As early as the twelfth century suit of service at the county court has become a resented burden.⁶³ Its direction passes to the sheriff; immunities deprive it of its representative character;⁶⁴ the possessory assizes made its jurisdiction comparatively unimportant. If it remains as an administrative area its control is exercised, at least from the time of Richard I,⁶⁵ by the conservators of the peace; and when under Edward III that office was established in something like its modern form,⁶⁶ it proves so successful as gradually to supersede the shire court as the unit of local administration. It remained, indeed, an electoral center; but its communal character is entirely lost. Even more tragic is hundredal history. They had begun

⁶³ Maitland in 3 *ENG. HIST. REV.* 418.

⁶⁴ 1 *P. & M.*, 2 ed., 548.

⁶⁵ *STUBBS, SELECT CHARTERS* (ed. Davis), 237. *Cf.* 1 *STUBBS, CONSTIT. HIST.*, 6 ed., 570.

⁶⁶ *Cf.* 1 *EDW. III, St. II, § 16*; 18 *EDW. III, St. II, § 2*; 34 *EDW. III, c. 1*.

quite early to pass into private hands. Offa of Mercia, so at least the Bishop of Salisbury claimed,⁶⁷ had granted to his predecessor the hundred of Ramsbury in Wiltshire. Three of the hundreds of Worcestershire belonged in the eleventh century to the church of the cathedral city.⁶⁸ In 1255 more than half the hundreds of Wiltshire were in private hands; nor is the tale of Devon, some seventy years later, less complete.⁶⁹ Communal control becomes individual control. The units of local government cease to be bodies that may hope for corporateness and become living men. The hundred becomes an object of property, and as such its internal development ceases to burden or to influence the history of corporations.

Of manor and vill the history is a similar one. Seignorial jurisdiction sweeps them into its sway. The kings are fairly generous in their grants; and even if the immunity may conveniently be limited by the skill of royalist lawyers, still the great inquiry of Edward I shows that immunization has gone far.⁷⁰ But perhaps more serious still is the jurisdictional element implicit in the character of feudalism. The lord has tenants; he holds a court for those tenants.⁷¹ That right will be exercised so far as royal claims will allow. Feudal justice was a potent weapon in the subjection of the free men.⁷² Even if all feudal power be in its origin — as post-conquestual theory makes it — a royal power, still the significant fact remains that the primary nature of this legal machinery is its personal character. The courts are men's courts. The justice in them will be lord's justice; and however firmly the little community may cling to its pathetic antiquarianism it is many centuries before royal justice will begin once more to protect the force of custom. It is a steady tale of oppression that we read. The communities of these villages are feeble enough; and they become the easy prey of the king and his lords. That process of conquest and subjection seems steadily to have deprived these groups of what pretensions they had before possessed to corporateness. The land is reorganized on a personal basis. If the freeholder retains vague rights of common, a period of inclosures will

⁶⁷ ROT. HUND. II, 231.

⁶⁸ 1 DOMESDAY BOOK 172 b.

⁶⁹ 1 P. & M., 2 ed., 558.

⁷⁰ 1 P. & M., 2 ed., 572-73.

⁷¹ Cf. DOMESDAY BOOK AND BEYOND, 80 ff.

⁷² *Ibid.*, 318 ff.

teach us for just how little that vagueness really stands;⁷³ and even Bracton seems to think of them in terms which suggest a personal origin.⁷⁴ The Statute of Merton is a weapon in the lord's hand of which he will not fail to make good use. That "sufficient pasture" which he is to leave for the use of freeholders seems on the whole a serious invasion of the manorial community.⁷⁵ What is the criterion of sufficiency save custom? And who shall give custom the binding force of law?

These communities, in fact, become but little more than quasi-geographical expressions. The power they had once possessed of a suggestive self-government passes to the hands of natural persons. There is little enough need in such a result to speculate deeply about the nature of their personality. The rules of law will fit lord and king and freeholder easily enough. The need for their expansion, in this context at least, loses its force. "The figure of the ideal person vanishes," says Maitland,⁷⁶ "or rather at times it seems to become a mere mass of natural persons." Certainly this is true of all medieval groups save those of the borough and the church. Their collectivism crumbles into dust at the approach of men.

Nor does it appear that the lawyers of this age had very different notions. The word *communitas* is a large and ambiguous one. Neither the writers of textbooks nor chronicles use it with any precision. The *communitas bacheleriae Angliae*⁷⁷ can have been in no legal sense a corporation. What Bracton will say of the *universitas* will, indeed, show some continental influence; but at best he is troubled and confused by what he has thereof to say.⁷⁸ Exactly those things of which we should in this context expect some speech — the things which on the continent at least were troubling vastly the Italian lawyers — are absent from his survey.⁷⁹ The relation of the corporate body to the crown — the fundamental problem

⁷³ Mr. Tawney's "Agrarian Problem in the Sixteenth Century" has recently told most brilliantly that pitiful story.

⁷⁴ BRACTON, f. 230, 230 b.

⁷⁵ See the weighty remarks of PROFESSOR VINOGRADOFF, *VILLEINAGE IN ENGLAND*, 272-74. He thinks that the Statute of Merton actually changed the common law.

⁷⁶ 1 P. & M., 2 ed., 492.

⁷⁷ STUBBS, *SELECT CHARTERS* (ed. Davis), 331. Cf. 2 STUBBS, *CONSTIT. HIST.*, 6 ed., 87.

⁷⁸ Cf. MAITLAND, *BRACTON AND AZO* (Selden Soc.), 87, 90.

⁷⁹ Maitland has pointed out that Bracton has nowhere realized that the ecclesiastical body is an *universitas*. 1 P. & M., 2 ed., 496.

in the theory that was to be evolved — he will not even discuss. Surely the cause of such conspicuous absence can but be apparent on the surface. If there is lacking a theory of corporations it is because that which men later deem a corporation is not to be found.

The borough, admittedly, is different; but the borough will not, at any rate before the fourteenth century, assist us to evolve a corporate theory. It will not aid us because the theory which governs its relations to the state is one which denies the necessity of speculation as to its character. Every borough is some person's borough. Every borough derives its privileges and immunities from a grant to be produced at will. Spontaneous it may be their growth is; and that spontaneity will preserve their communalism for a day more receptive to the approach of theory. But act they must not without royal warranty. That which they will obtain is a matter of gold and silver. The king drives a hard and fisty bargain. The most famous definition of a corporation which the new world has given to the old seems best to fit the matter. It is with franchises, financial, juristic, economic, that we are concerned. We seem to have a scale of values from the vast freedom of London to the emulant anxiety of a tiny township. But no immunity can be obtained by any process of self-institution. The rights are the rights of the lord or of the king, and it is very clear that they are for sale. And if they are for sale they are revocable, for the will of kings is arbitrary, and each burst of temper will beget repurchase.

Sufficiently late, indeed, this concession theory remains. The stout-hearted Tudors recked little of group-corporateness in their effort after unity; and the making and unmaking of boroughs was a weapon they brought not seldom into use.⁸⁰ Those cities which forfeited their charters under the *quo warranto* of Charles II illustrated no different theory.⁸¹ The "spoils of towns" with which, as North tells us,⁸² Jeffreys returned from his Bloody Assize is a significant response to Monmouth's appeal against the "Court Parasites and Instruments of Tyranny" who had urged the right of forfeiture.⁸³ But it is in the beginnings of our history that we

⁸⁰ 1 HALLAM, CONSTIT. HIST. (Everyman's ed.), 47.

⁸¹ 2 *Ibid.*, 411.

⁸² NORTH'S EXAMEN, 626.

⁸³ See the interesting citation in CARR, CORPORATIONS, 170-71. The Commons ordered it to be burned by the common hangman.

must search for the origin of these ideas. All goes back to the king. When Archbishop Thurstan wished his men of Beverley to have the privileges of the citizens of York he must have the royal permission to that end.⁸⁴ Henry II's clerks had quickly some questions to ask (also some fines to levy) when the butchers and pilgrims of London sought to set up their gilds.⁸⁵ Aylwin of Gloucester, who was perhaps somewhat Frenchified by travel, was soon brought to see the advantage of an English model when the exchequer fined him one hundred pounds for his Gloucester experiment;⁸⁶ and, six years later, if Thomas from beyond the Ouse escaped more lightly, the fine of twenty marks is proof of royal control.⁸⁷ As late as 1305 the townsmen of Salisbury could only escape the burden of an episcopal tallage which had grown ruthless by placing themselves on the royal hands.⁸⁸ Even London is not sufficiently powerful to withstand the royal anger. The part it played in the historic crisis of Henry III's reign was sufficient to entail the temporary abolition of its mayoralty.⁸⁹ Edward I (who treated York in similar fashion) ⁹⁰ kept the liberties of the city in his hands for twelve years when the mayor sought to restrain the justices in eyre from entering it.⁹¹ When London chafed at the exactions of Richard II, he seized the occasion of a chance riot to revoke its rights ⁹² and to remove the Common Pleas to York;⁹³ and only the compassion of the queen secured their restitution.⁹⁴ Edward I held London liable for the trespass of its officers;⁹⁵ and Dunwich suffered in a similar fashion.⁹⁶ Nor did the fact of incorporation matter. When the citizens of Wainflete took toll unjustly the fact that they had no charter served in no way to protect them,⁹⁷

⁸⁴ STUBBS, *SELECT CHARTERS* (ed. Davis), 131.

⁸⁵ MADOX, *HIST. OF EXCHEQUER* (ed. of 1711), 390.

⁸⁶ *Ibid.*, 391.

⁸⁷ MADOX, *FIRMA BURGI*, 35.

⁸⁸ 1 ROT. PARL. 175-76.

⁸⁹ 1 STUBBS, *CONSTIT. HIST.*, 6 ed., 588.

⁹⁰ 1 ROT. PARL. 202.

⁹¹ 1 STUBBS, *CONSTIT. HIST.*, 6 ed., 590.

⁹² HIGDEN, *POLYCHRONICON*, IX, 268.

⁹³ 7 RYMER, *FOEDERA*, 213.

⁹⁴ HIGDEN, *POLYCHRONICON*, IX, 274.

⁹⁵ MADOX, *HIST. OF EXCHEQUER*, 698.

⁹⁶ MADOX, *FIRMA BURGI*, 154. For a similar instance of Dover, see RYLEY, *PLAC. PARL.*, 287.

⁹⁷ MADOX, *FIRMA BURGI*, 64, and other instances there cited.

for such towns can sue or be sued as the men of the king.⁹⁸ Even an amorphous body like the "Knights of the bishopric of Durham" can lie in the royal mercy.⁹⁹ The mere enumeration of the towns vested in the king is evidence of his substantial power;¹⁰⁰ and when he grants out his powers for money — as the venality of Richard I did with unceasing hand¹⁰¹ — he draws a firm distinction between possession and ownership.¹⁰²

Corporateness — we do not say the fact of incorporation — is clearly here preserved; and it is preserved because it is profitable to the crown. Where men act in group-unity you can fine them, if the single assumption be made of an action which derives from royal kindness. The king concedes powers: he is real enough. And so long as the relation of a borough is for the most part with him, a speculation as to the nature of burghality is here as elsewhere unneeded. But with the borough a new day will presently dawn. The England of the fourteenth century will begin to untie the jealous knot of separatism. It will begin a hundred-years' struggle with France and find a sense of unity in that suffering, while the horrors of the Black Death will spell consolidation.¹⁰³ There were new needs to satisfy; and new ideas are required for their satisfaction.

IV

Let us go back to our churches. Of ecclesiastical communities medieval England has in truth a plethora, for our ancestors were pious men, willing enough, as the charters bear witness, to buy their salvation at the expense of their property. And these communities are voluntary in character with a definite purpose behind them; it is not difficult to feel that their wills are to serve those purposes.¹⁰⁴ Who owns their possessions? That is a more troublesome question. Lands from the earliest times are church lands; and the opening words of English law ascribe a special sanctity to the property of

⁹⁸ MADOX, *FIRMA BURGI*, 65.

⁹⁹ *Ibid.*, 85.

¹⁰⁰ See the striking statistics in MADOX, *FIRMA BURGI*, 4 ff.

¹⁰¹ STUBBS, *SELECT CHARTERS* (ed. Davis), 258.

¹⁰² Cf. Madox's phrase, "He had a compleat seisin of it [the town] with all its parts and adjuncts," *loc. cit.*, 14.

¹⁰³ Cf. I CUNNINGHAM, *GROWTH OF ENGLISH INDUSTRY*, 378 ff.

¹⁰⁴ Cf. I P. & M., 2 ed., 510.

God and of the church.¹⁰⁵ But what is the church that owns them and what is the nature of their possession? The early rules of law are rather fitted to deal with the problems of natural or of immortal men than of a group which raises a metaphysical inquiry.¹⁰⁶ It is simple enough when the property of the diocese is at the disposal of the bishop;¹⁰⁷ but for a cellular and separatist England it is too simple by far. If the church is owned, it will also own; and Bracton has noted the difference between the ownership and the right of presentation to its control.¹⁰⁸ If the church owns land, some speculation there must be about the nature of that church; and there are lawyers enough (canonist at that) anxious to weave theories that will give the ecclesiastical community the full benefit of its powers. Mysticism, of course, we shall have early, for St. Paul had given to Christians the picture of an ecclesiastical organism,¹⁰⁹ and men like John of Salisbury and the great Cardinal of Cusa will push the comparison to the point of nausea.¹¹⁰ Crude as is this anthropomorphic conception, it is not without its influence on law. If the body ecclesiastic is to be given substantiality, a head must control its action; and the abbatial church will be so much the possession of its abbot that Domesday Book can indifferently equate him with church and convent.¹¹¹ That is perhaps the more natural when it is remembered that the monks are legally dead and thus no longer the subjects of rights. Certainly as late as Edward IV that need of a head for corporate activity will give much trouble.¹¹² But restrictions must be laid on that power since, after all, the rights and purposes of founders must be protected. Maitland has printed a Register of Writs from the reign of Henry III which contains the royal writ protecting the convent against the forcible alienation of a former abbot — a protection of canonical law;¹¹³ and the Statute of Marlborough in obviating the limitation of personal actions by the death of the wronged abbot in some sort

¹⁰⁵ Laws of Ethelbert, c. I, STUBBS, *SELECT CHARTERS* (ed. Davis), 66.

¹⁰⁶ Cf. 3 HOLDSWORTH, *HIST. ENG. LAW*, 363.

¹⁰⁷ 1 P. & M., 2 ed., 497.

¹⁰⁸ BRACTON, f. 53.

¹⁰⁹ Epist. Rom., XII, 4, 5; Epist. Cor., XII, 12, 14; Epist. Col., I, 18, 24.

¹¹⁰ Cf. GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE*, 132.

¹¹¹ 1 P. & M., 2 ed., 504.

¹¹² Y. B. 18 HEN. VI, f. 16. Y. B. 1 EDW. IV, f. 15, 31, etc.

¹¹³ 2 COLL. PAPERS, 144, no. 43. Cf. *CORPUS JURIS*, 3, X, 3, 10.

emphasizes conventual rights.¹¹⁴ As the years go by these convents will bring their actions in a name which betokens incorporate aggregation;¹¹⁵ the "dean and chapter of St. Paul's" is neither dean nor chapter. It has a connecting link about it — shall we say a seal?¹¹⁶ — which perhaps we may best term its corporate personality. And when Bracton talks of a body that endures forever, even though death may thin its ranks, though the language is vague and hesitant it is clearly reflective of new ideas.¹¹⁷

And what is perhaps of fundamental import is the thought to which Innocent IV gave decisive expression.¹¹⁸ Whether he in fact perceived the vast significance which lay behind his attribution of fictitious personality to communities may perhaps be doubted.¹¹⁹ But the phrase, whatever its author meant it to imply, gave exactly the impulse to the current of men's thoughts for which they had long been waiting. For immediately we have the acts of a person, the nature of that person may be matter of debate. Inevitably the phrase of a Pope begets discussion.¹²⁰ What is more important is the means it gives us of passing from anthropomorphic terms (though retaining the memory of them) to representative action. If the group-person is to act, it will prove no small convenience to designate those through whom its action may be effective. It is difficult to persuade all men that you are right. Yet it seems clear enough that in the early church, as at Elvira,¹²¹ for instance, and at Nicæa,¹²² unanimity was essential; nor is there any suggestion of ought save unanimity at the fifth and sixth œcumenical councils.¹²³ It seems plausible, indeed, to urge that not until the Council of Ferrara did the majority principle obtain its full sway in the corporate church.¹²⁴ But long before this time the concept of

¹¹⁴ STAT. OF MARLBOROUGH, c. 28 (52 HEN. III).

¹¹⁵ Cf. BRACTON, NOTE-BOOK, Pl. 482, 654, etc.

¹¹⁶ Cf. Y. B. 20 EDW. III, 96, 98 (Rolls Series).

¹¹⁷ BRACTON, f. 374 b. The comparison is to a flock of sheep which remains the same though the individual sheep die.

¹¹⁸ 3 GIERKE, GENOSSENSCHAFTSRECHT, 279 ff.

¹¹⁹ Cf. on this Mr. H. A. Smith's pertinent criticisms, LAW OF ASSOCIATIONS, 152-57. He seems to me to have shown good ground for doubting Dr. Gierke's picture of Innocent as a great speculative lawyer.

¹²⁰ 3 GIERKE, GENOSSENSCHAFTSRECHT, 227-85.

¹²¹ I HEFELE, HIST. DES CONCILES, 131.

¹²² *Ibid.*, 320.

¹²³ 4 *Ibid.*, 164.

¹²⁴ II *Ibid.*, 399, 402. Even then it is a two-thirds majority; and the attitude to

representative action had been clearly understood. The Glossators had begun, if with hesitation, to call the delict of a majority of a church the delict of the church itself.¹²⁵ Roffredus in the middle of the thirteenth century was discussing corporate personality with the comfort which comes from understanding;¹²⁶ and Johannes Andreae found little difficulty in emulating that significant example.¹²⁷ It becomes evident to men that what is important is not so much unanimous opinion as corporate opinion; and they begin to realize that corporate opinion is largely a matter of form to which the verdict of a majority will give substance.¹²⁸ And by the time of the post-Glossators — and very notably in the great Bartolus¹²⁹ — the idea of the group as a corporation is fully and strikingly developed.¹³⁰

Nor was it difficult to apply these new doctrines to the great orders which were springing up at the behest of Francis and of Dominic. Dominic especially is one of the greatest of federalist statesmen. Almost from the outset the order was cognizant of representation as the basis of corporate action.¹³¹ It does not seem unnatural to suppose that the idea passed from the Black Friars to the convocation of the English church.¹³² But one of the primary objects of convocation is fiscal; and the kings must have soon discovered that representation is an admirable method of countering such absential recalcitrance as that of Geoffrey of York.¹³³ Certainly little by little the idea seems to follow a secular path. But majority action did not come lightly into parliamentary affairs. As late as 1290 the barons could bind their absent peers only *quantum in ipsis est* — and we do not know the extent of that power.¹³⁴ Contumacy, of course, merited and met with punishment; but the

the dissent of a single archbishop to the resolutions on the *Filioque* clause is very striking. 11 HEFELE, HIST. DES CONCILES, 461.

¹²⁵ E. g., the gloss to L. 160, § 1, D. 50, 17, 10 C. 1, 2, *Verbo Corrigimus*.

¹²⁶ Cf. his *Quaestiones Sabbathinae*, 23, 27.

¹²⁷ JOH. ANDR. NOV. s. c. 16, in VI, 3, 4, n. 4.

¹²⁸ Gloss. to c. 56, C. 12, q. 2, *Verbo Accusandi*. Cf. 3 GIERKE, GENOSSENSCHAFTS-RECHT, 345, for a striking example.

¹²⁹ Cf. C. N. SIDNEY WOOLF, BARTOLUS, 123-24, 160-61.

¹³⁰ 3 GIERKE, GENOSSENSCHAFTSRECHT, 354.

¹³¹ BARKER, THE DOMINICAN ORDER AND CONVOCATION, 4 ff., 18.

¹³² *Ibid.*, 49, 51.

¹³³ 1 STUBBS, CONSTIT. HIST., 6 ed., 562.

¹³⁴ 2 *Ibid.*, 253.

medieval idea that each group in the realm may bargain separately about its ratability struggled long and hardily before it died. What slew it was the creation, in 1295, of a fully representative parliament.¹³⁵ The "Common assent of the realm" of which the *Confirmatio Cartarum* makes such impressive mention,¹³⁶ means finally that, for fiscal purposes at least, the kingdom has become incorporate. "It was no longer," says Stubbs,¹³⁷ "in the power of the individual, the community, or the estate, to withhold its obedience with impunity." Somewhere or other the men of the kingdom, great and humble alike, are present in Parliament. That *commune consilium regni* which henceforward figures so largely in the preamble of statutes is the sign of a change drawn from ecclesiastical example. The administrators of the thirteenth century are learning the lessons of the canon law. Surely in this aspect we are to read the statute of Mortmain as the result of a growing acquaintance of the common lawyers with the nature of groups which the canonists have already long envisaged as immortal.¹³⁸

The ecclesiastical community, moreover, comes with increasing frequency to court. It thus compels men to speculate upon its nature. They will learn why the new abbot will set aside an irregular conveyance of his predecessor.¹³⁹ They will theorize as to why monastic tort is at bottom conventual tort.¹⁴⁰ Even the conception of the church as a perpetual minor will at any rate make them see that the church lands are not the possession of its incumbent.¹⁴¹ The canons of Hereford may be sued where its particular canon has done wrong.¹⁴² Even if, as Maitland has pointed out,¹⁴³ our lawyers will learn less than might be hoped from examples that derive from quasi-despotism, the mere fact of meeting is important. It is important because it prevents the knowledge of new ideas as to corporateness from perishing at birth. The clergy are a litigious race; and the rules of their legal governance must have compelled

¹³⁵ STUBBS, CONSTIT. HIST., 6 ed., 256.

¹³⁶ STUBBS, SELECT CHARTERS (ed. Davis), 490.

¹³⁷ 2 STUBBS, CONSTIT. HIST., 6 ed., 257.

¹³⁸ 3 HOLDSWORTH, HIST. ENG. LAW, 367.

¹³⁹ 1 P. & M., 2 ed., 504.

¹⁴⁰ Y. B. 49 EDW. III, Mich. Pl. 5.

¹⁴¹ 1 P. & M., 2 ed., 503. BRACTON, f. 226 b is the fundamental passage.

¹⁴² PLACIT. ABBREV. 53.

¹⁴³ 1 P. & M., 2 ed., 508.

a frequent resort to the *Corpus Juris* from which their inspiration was derived. There our English lawyers will learn how majority action is corporate action and how the corporation is a person. And if they are slow to see the significance of so much abstractness, there will yet come a time when the movement from church affairs to the problems of the lay world may be made.

V

That Bracton could call the town an *universitas* is perhaps accident rather than design.¹⁴⁴ Yet it is the borough which compels our lawyers to recognize the significance of theory. At what day the *liber burgus* becomes in a full sense corporate we may not with any precision speculate; but, of a certainty, the older authorities were wrong who ascribed that change to the middle fifteenth century.¹⁴⁵ The *communitas* of the borough is gaining abstractness as the years of the first Edward draw near their end.¹⁴⁶ In the reign of his successor the courts are talking freely of the bodiliness of towns.¹⁴⁷ The good citizens of Great Yarmouth betray a healthy anger when the townsmen of their smaller brother "who are not of any community and have no common seal" pretend to burghal rights.¹⁴⁸ The *Liber Assisarum* has not a little to say of the physical substantiality of a city which is not its citizens.¹⁴⁹ Richard II takes compassion upon the good men of Basingstoke who have suffered the scourge of fire, and incorporation is the form his pity takes — with a common seal thereto annexed.¹⁵⁰ Nor, assuredly, may we belittle in this context the meaning of his extension to cities and to boroughs of the provisions of Mortmain.¹⁵¹ It is made thereby very clear that the nature of corporateness is becoming known to men. The citizens of Plymouth were not less clear about its nature when they petitioned Parliament that for the purchase of free tenements for life they might become *un corps corporat*.¹⁵²

¹⁴⁴ BRACTON, f. 228 b.

¹⁴⁵ As Merewether and Stephens did. Cf. 1 GROSS, GILD MERCHANT, 93 ff.

¹⁴⁶ 2 GROSS, *op. cit.*, 18.

¹⁴⁷ 1 *Ibid.*, 94.

¹⁴⁸ 4 CLOSE ROLLS, 19 EDW. II, 457-61.

¹⁴⁹ Liber Ass. 62, 100, 321.

¹⁵⁰ 5 CHARTER ROLLS 336.

¹⁵¹ 2 STUBBS, CONSTIT. HIST., 6 ed., 509.

¹⁵² 3 ROT. PARL. 663.

The union of the two Droghedas into a single county — a corporate county the record will make it¹⁵³ — suggests that we have passed to the language of a new jurisprudence. We have synthesized men into the abstraction of a new being. What has happened is less the acquisition of new rights than the formulation of a means whereby collective action may be taken by that which is not the body of citizens even while it is still the citizen body.¹⁵⁴ The later use of the corporate term to mean that oligarchic body which will with such difficulty be reformed in the nineteenth century, is evidence of how easily the towns absorbed the possibilities laid open by representative action.¹⁵⁵

The point to which such evidence must drive us is surely the admission that by the time of Edward III the concept of burghality has undergone a change. Not, indeed, that the meaning of that change has been grasped in any sense that is full and complete. If the courts cannot separate John de Denton from the Mayor of Newcastle, the ghost of anthropomorphism can still trouble the joys of corporate life.¹⁵⁶ Yet within less than a century the meaning of such confusion is clearly understood.¹⁵⁷ But the attribution of property to a corporation as distinct from its members is already made at the earlier time;¹⁵⁸ and the great Fortescue will be willing to protect the corporator's property against seizure for the debts of the corporation.¹⁵⁹ The lawyers, moreover, begin to wander from the realm of fact to that in which the delights of fancy may be given full rein. The judges can sit back in their chairs and speculate about its torts and treasons,¹⁶⁰ while Mr. Justice Choke — surely with some memory of the canon law in his mind — will inform us that it lies beyond the scope of excommunication.¹⁶¹ And since a corporate person must needs have a voice, the seal will be given to it whereby it may in due form have speech.¹⁶² Trespass

¹⁵³ 1 GROSS, *op. cit.*, 94, n.

¹⁵⁴ Cf. MEREWETHER & STEPHENS, *HIST. OF BOROUGHES*, 242.

¹⁵⁵ 2 MAY, *CONSTIT. HIST.*, 494 ff.; MAITLAND, *TOWNSHIP AND BOROUGH*, 12.

¹⁵⁶ Y. B. 17, 18 EDW. III, 70 (ed. Pike).

¹⁵⁷ Y. B. 8 HEN. VI, Mich. Pl. 2, 34, and cf. 1 P. & M., 2 ed., 493.

¹⁵⁸ 17 ASS. Pl. 29. Cf. also Y. B. 8 HEN. VI, Mich. Pl. 2.

¹⁵⁹ Y. B. 20 HEN. VI, Pl. 18.

¹⁶⁰ Y. B. 21 EDW. IV, Pl. 13, 14.

¹⁶¹ *Ibid.*, Pl. 14.

¹⁶² Y. B. 21 EDW. IV, Hil. Pl. 9. I need not say how much this analysis owes to Maitland. See especially 1 P. & M., 2 ed., 488-93, and 678 ff.

against its property the courts will not hesitate to admit¹⁶³ if they still shrink somewhat from admitting its sufferance of certain grave forms of wrong.¹⁶⁴ Surely the "gladsome light" of this jurisprudence is a new and a refreshing thing.

A new commerce, moreover, is beginning, and it casts its shadows across the pathway of our history. The Black Death and the Hundred Years' War brought with them distress in their trail. The social movements which are their consequence are too vast for a local authority to control, and from separatism we pass to the national consolidation which reached its zenith under the Tudors.¹⁶⁵ What is perhaps above all important is its resultant emphasis on the class structure of industrial society.¹⁶⁶ The emergence of the capitalist seems to synchronize with the emergence of new forms of business organization. As early as 1391 Richard II, whose reign seems generally to have marked the onset of a new time, was granting a charter to what is at least the *communitas* of the English merchants in Prussia;¹⁶⁷ and Henry IV was not slow to emulate the novelties of his predecessor.¹⁶⁸ The organization of foreign merchants in England will be encouraged, since a unit permits with satisfactory ease of the assessment the kings hold dear.¹⁶⁹ The very phrases which suggest the corporate idea begin everywhere to make their appearance. Henry VII made the Englishmen of Pisa a corporation in 1490.¹⁷⁰ The great trading companies which are in some sort the parents of empire begin to buy their charters. Henry VII provided the Merchant Adventurers with what protection the written privilege of an English king might afford;¹⁷¹ and it has been significantly pointed out by Dr. Cunningham that the object of the grant was rather the encouragement of commercial speculation than the governmental regulation of commerce. These companies seem to arise with all the spontaneity that marks the communalism of our earliest history. Their appearance is very

¹⁶³ Y. B. 21 EDW. IV, Pl. 13.

¹⁶⁴ *Ibid.*; and cf. 22 ASS. Pl. 67.

¹⁶⁵ Cf. 1 CUNNINGHAM, GROWTH OF ENGLISH INDUSTRY, 375 ff.

¹⁶⁶ Cf. Mr. Unwin's pregnant remarks. INDUSTRIAL ORGANIZATION IN THE XVITH AND XVIITH CENTURIES, 16-19, 85-93.

¹⁶⁷ 7 RYMER, FœDERA, 693.

¹⁶⁸ *Ibid.*, 360, 464.

¹⁶⁹ 1 CUNNINGHAM, *op. cit.*, 420-22.

¹⁷⁰ 12 RYMER, FœDERA, 389-93.

¹⁷¹ 1 CUNNINGHAM, 416.

striking, since the simpler forms of such business organization as the partnership were already well known.¹⁷² But the partnership seems too narrow in its scope for the larger ideas of fellowship these fifteenth century Englishmen have inherited from their ancestors. Why they should have chosen the corporate form of life is perhaps not wholly clear. But the step is taken, and from the time of Elizabeth it is in them rather than in the municipal corporation that the historian of corporate theory must be interested. Moreover, after 1515 they could not escape from the king's hands even if they remained a voluntary society; the ministers of Henry VIII recked but little of formal matters.¹⁷³ The companies, for the most part, deal with a foreign trade in their earlier history. They want privileges because they are journeying into far, strange lands; and it is surely one of the happiest thoughts of Philip and Mary (whose grandparents had tasted the rich fruits of maritime adventure) which led them to incorporate a company of which the great Sebastian Cabot was the governor.¹⁷⁴

We may not surely deny that this corporateness is inherited from burghal organization. These merchants have learned the value of their fellowships from the gilds of the towns; and not seldom they strive, in all the bitterness of a novel rivalry, with the older crafts and mysteries of the towns.¹⁷⁵ It is perhaps from the analogy of the medieval staple towns that we shall find the connection.¹⁷⁶ Its whole point lies in the organization of a group of men into something like an unity; and once the charters are forthcoming, the incidents of corporateness are not wanting. The sense of exclusiveness must have been fostered by the stress of the keen foreign competition they had from the outset to face. Englishmen have had pride in their isolation, and they did not find it difficult to combine against alien rivals.¹⁷⁷ We can imagine that a medieval government which understood the difficulties of evolving a foreign policy would welcome the spontaneous development of groups of

¹⁷² ASHLEY, *ECONOMIC HISTORY*, pt. ii, 414.

¹⁷³ See 6 HEN. VIII, c. 26. This succession of acts seems to have ended in Edward Sixth's reign.

¹⁷⁴ 2 HAKLUYT, *VOYAGES* (Maclehose ed.), 304.

¹⁷⁵ LAMBERT, *TWO THOUSAND YEARS OF GILD LIFE*, 158, for Hull; LATIMER, *HIST. OF THE MERCHANT VENTURERS OF BRISTOL*, 26.

¹⁷⁶ ASHLEY, *op. cit.*, pt. ii, 217.

¹⁷⁷ 1 CUNNINGHAM, *op. cit.*, 417-20.

men who for the royal protection we term incorporation would call a new world into being.¹⁷⁸

These companies are, at the outset, at least, devoted for the most part to external trade; so John Cabot and his sons, in return for no more than an exclusive right to traffic (whereof the fifth part of the capital gain will fill the coffers of the avaricious Tudor), will engage to plant the English flags in lands "which have hitherto been unknown to Christians."¹⁷⁹ That Master Hore of London whose "goodly stature and great courage" perhaps inclined him to the "study of cosmography" planned his establishment of the Newfoundland fisheries in return for a similar monopoly.¹⁸⁰ But gradually the expedient becomes of obvious advantage in internal commerce. When burghal monopoly of trade begins to break down, it became clear that the crafts were no longer able to cope with the scale of national development. It was obvious that the essential need was either a fully developed national control or no control at all. And it is perhaps singularly fortunate that this industrial expansion should have synchronized with the accession of so able and vigorous a sovereign as Elizabeth.¹⁸¹

The patents of monopoly which she granted with so royal a hand were a definite and systematic attempt after industrial unity. They continued in a new fashion the regulation which had made the crown the center of the economic system. Granted at first rather to individuals than to groups of men, the opportunities of profit they opened up soon and naturally attracted the courtiers into the race for wealth. So that if Elizabeth was somewhat hard in her dealings with inventors,¹⁸² she was apparently woman enough to make the road that led to her favorites' hearts a gilded one. Little by little the recipient of her bounty becomes a group rather than an individual, until, under the Stuarts, the collective monopoly is the more typical form.¹⁸³ In the mining monopoly of Master Thurland of the Savoy, Pembroke and Cecil and Leicester are all most willing to share.¹⁸⁴ Corporations, indeed, we shall hesitate

¹⁷⁸ 2 CUNNINGHAM, *op. cit.*, 214.

¹⁷⁹ 12 RYMER, *FEDERA*, 595.

¹⁸⁰ 1 CUNNINGHAM, *op. cit.*, 505.

¹⁸¹ 2 *Ibid.*, 25.

¹⁸² PRICE, *ENGLISH PATENTS OF MONOPOLY*, 16.

¹⁸³ *Ibid.*, 35.

¹⁸⁴ *Ibid.*, 50.

to call groups that are often no more than amorphous partnerships. But that form of organization is far from wanting, and its meaning is very clearly conceived. When Sir Thomas Smith, who toyed with chemistry in the intervals, doubtless, of his political and legal studies, claimed to have found at length the philosopher's stone, a corporation was founded to do him honor for so signal a triumph.¹⁸⁵ Drake seems fully to have realized the meaning of such organization;¹⁸⁶ and we may be sure that the great Sir Humphrey Gilbert when he incorporated "The Colleagues of the Fellowship for the Discovery of the Northwest Passage"¹⁸⁷ was by no means sacrificing the practical to his sense of stateliness. The list of monopolists which Sir Robert Cecil communicated to the House of Commons in 1601 contained not a few groups of men.¹⁸⁸ That "Fellowship of English Merchants for the Discovery of New Trades" wherein, mayhap, the Muscovy Company concealed its commercial cousinship with barbarians in dignified phrasing,¹⁸⁹ shows us in what direction men's minds are tending. The relation, in fact, between monopolies and joint-stock enterprise is the dominant note of the time.¹⁹⁰ The resuscitation of local companies is giving new vigor to the collective efforts of men.¹⁹¹ It is suggestive of the recognition of value in such effort that a definite encouragement of their creation should meet with the approval of the crown.¹⁹²

All this we take to mean that the significance of corporateness has been firmly grasped. And when men tell us of the causes of their desire for it, they speak with a definite perception of its character far different from the misty conceptions of medieval time. The East India Company becomes "a body corporate and politic" because only in such fashion can it cope with problems so vast as that of an eastern civilization.¹⁹³ The immortality of a corporation

¹⁸⁵ *The Society of the New Art*. See the amusing account of its adventures in STRYPE, *LIFE OF SIR T. SMITH*, 100 ff.

¹⁸⁶ S. P. Dom. Eliz., XCV, 63.

¹⁸⁷ S. P. Dom. Eliz., CLV, 86.

¹⁸⁸ PRICE, *op. cit.*, 148 ff.

¹⁸⁹ 3 HAKLUYT, *op. cit.*, 83.

¹⁹⁰ UNWIN, *op. cit.*, 164.

¹⁹¹ LAMBERT, *op. cit.*, 236, 273, 316; HIBBERT, *GILDS*, 77. The Statute of Artificers had, of course, much the same purpose.

¹⁹² Winchester, in LAMBERT, *op. cit.*, 382; and cf. 2 CUNNINGHAM, *op. cit.*, 36.

¹⁹³ The charter of 1600 in PROTHERO, *STATUTES AND CONSTITUTIONAL DOCUMENTS*, 448 ff.

was what tickled the palates of the Miners Royal.¹⁹⁴ Unity of assent and need of better government led Henry VIII to give the merchants of Andalusia the rights a moment of friendship with the emperor led the latter to confirm.¹⁹⁵ Thomas Thurland, whom much mining had made somewhat impoverished, turned his holdings into a company in admirable anticipation of modern methods.¹⁹⁶ When in 1605 the "free traders" of the time sought means of hindering this corporate growth, the merchants who favored it were very ready with their answer. They insisted that only with such an organization could they have the adequate protection of the law. The trade needed regulation, and its corporate character provided the simplest means to that end. Competition, moreover, would prevent the maintenance of quality and would be subversive of all good order. The Privy Council accepted their statement and the charter was renewed.¹⁹⁷ The arguments seem to come with a familiar note to a generation not less puzzled by a similar question. But even more striking, perhaps, were the words of one who mirrored in himself the resplendent qualities of that spacious time. When the House of Commons, on the 20th of November, 1601, debated the merits of monopolies as an economic system, there were not a few who strove to distinguish between grants made to persons and grants made to the corporate groups of men. Francis Bacon, at any rate, saw clearly the illogic of such distinction. "If her Majesty," he said,¹⁹⁸ "make patent or a monopoly into any of her servants, that we must go and cry out against; but if she grant it to a number of burgesses, or a corporation, that must stand, and that, forsooth, is no monopoly." The history of half a thousand years is in that significant equation.

VI

If it was thus a new world that had developed, traces of the old still linger about its confines. If the corporation becomes a fully developed legal person, it is still dependent upon royal caprice. The king concedes it privileges; it is from his bounty that it takes

¹⁹⁴ STOW, *SURVEY* (ed. Strype), 246.

¹⁹⁵ *LETTERS AND PAPERS OF HEN. VIII*, No. 6640.

¹⁹⁶ PRICE, *op. cit.*, 50.

¹⁹⁷ S. P. DOM. JAC., I, XII, 59, 64.

¹⁹⁸ PROTHERO, *op. cit.*, 112. Cf. also p. 115.

its origin. In the last years of Edward III two judges did not shrink from holding that only the crown could erect a corporation.¹⁹⁹ When the citizens of Norwich pleaded their crimes to Sir John Fortescue, their liberties *de alto et basso* were seized into the royal hands.²⁰⁰ Madox has pointed out²⁰¹ that in the Tudor age gildation and incorporation are used transferably by the statutes; but from the Conquest the lawfulness of guilds depended upon royal permission. We cannot avoid the conclusion that the power to incorporate is no more than part of the general prerogative by which vast powers of regulation inhered in the king. The chartered companies demanded their charters because without them life would have been less than tolerable. While their members may have had a common law right to pass freely without the realm for any cause,²⁰² yet the king could prohibit any emigration on grounds of public safety;²⁰³ and the wisdom of Richard II chose to ordain, as the wisdom of James I chose to repeal, that none should pass out of the kingdom without royal license,²⁰⁴ while it was understood — men soothe themselves a little easily with phrases — that his power was not to be abused in the depression of commerce.²⁰⁵ Who is there who can call the crown to answer? Your mediæval merchant has sufficient experience of the ills he might not remedy. He will prefer to purchase his charter — the equivalent of a continuous passport — and avoid the costliness of legal controversy. The East India Company, in a later reign, was to have some hard experience of what that purchase meant.²⁰⁶

Nor was this theory of concession in any way diminished by such powers as those possessed by pope and palatine. If the popes did set up their religious corporations,²⁰⁷ the marital difficulties of Henry VIII soon drew a clear distinction between right and courtesy. The power of the Bishop of Durham²⁰⁸ was clearly derived from the *jura regalia* bestowed on him by the Conqueror

¹⁹⁹ Y. B. 49 EDW. III, f. 4, *per* Candish and Knivet, JJ.

²⁰⁰ MADOX, FIRMA BURGI, 291.

²⁰¹ *Ibid.*, 29.

²⁰² FITZHERBERT, NEW NATURA BREVIVM, f. 85.

²⁰³ Dyer, 165.

²⁰⁴ 5 R. II, repealed by 4 JAC. I, c. I, § 22.

²⁰⁵ HARGRAVE, LAW TRACTS, 91-92 (HALE, DE PORTIBUS MARIS, pt. 2, VIII).

²⁰⁶ 3 MACAULAY, HISTORY OF ENGLAND (Everyman's ed.), 241.

²⁰⁷ Y. B. 14 HEN. VIII, 2.

²⁰⁸ GRANT, CORPORATIONS, 11.

in return for an inconvenient proximity to Scotch marauders. Even more striking was the Elizabethan delegation of this power to any person or persons who should erect a hospital,²⁰⁹ whereof Coke significantly remarked that "these words do extend to anybody politic or corporate"²¹⁰ — an interpretation to which an earlier Tudor had already given utterance.²¹¹ The corporation by prescription — which seems to originate in this time, and thereby to prove the general acceptance of this concession-theory²¹² — takes for granted the written fact of royal approval. That which exists by implication surely does no more than define with firmness what hitherto has been vaguely deemed the royal will.²¹³ And since the Courts hold firmly that, if they exist without royal authority, attack on these corporate privileges is a valuable procedural plea,²¹⁴ it is surely plain that the early prerogative of the crown suffers no derogation.²¹⁵ The legal construction of charters seems to make evident the same tendency of thought. The charter, as Coke tells us,²¹⁶ is no less effective than an act of Parliament. It may not be interpreted in a manner other than that most favorable to the crown.²¹⁷ It limits by its very circumstances. These, surely, are the thoughts of men who deal with the rights of property. They are the thoughts of men who do not dream of questioning a royal prerogative which lies at the basis of the state.

But it is perhaps the extent of regulation and of confiscation which marks most clearly the character of this attitude. Everyone knows of that famous Ipswich procedure when the right to form a merchant-gild was granted to its burgesses.²¹⁸ When the merchant-gild passes from our view and the crafts take their place, we find

²⁰⁹ 39 ELIZ. c. 5.

²¹⁰ 2 CO. INST. 722.

²¹¹ 32 HEN. VIII, c. 7. Cf. Dyer, 83 b. The reaction from this view does not seem to come until 9 GEO. II, c. 36. Cf. 2 M. & W. 890.

²¹² Y. B. 2 HEN. VII, 13. Cf. Anon. doft. 556, and *Jenkins v. Harvey*, 2 C. M. & R. 339; 10 Coke Rep. 27.

²¹³ Y. B. 12 HEN. VII, 29.

²¹⁴ Anon. Dyer, 100. Cf. Pl. Q. W. 618.

²¹⁵ Y. B. 20 EDW. IV, 2; *Ibid.* 22 EDW. IV, 34; 12 HEN. VII, 27. Cf. BROKE, ABR. CORP., No. 33.

²¹⁶ 8 Coke Rep. 8. Cf. HALE, JURISDICTION OF LORDS HOUSE (ed. Hargrave), 20 ff.; Plowden 214.

²¹⁷ *Priddle v. Napper*, 11 Coke Rep. 8 (1612); *Knight's Case*, 5 Coke Rep. 56 (1688); *Willion v. Berkley*, Plowden 243 (1662).

²¹⁸ 2 GROSS, *op. cit.*, 114 ff.

that the crown has supplanted the earlier autonomy by the conference of municipal regulation.²¹⁹ The history of their relations may well suggest the thought that town and craft struggled mightily together in an age when civil war prevented too close an attention to their rivalries. But with the advent of the Tudor, there came significant innovation. The king has heard with displeasure that the "companies corporate" have used their rule and governance to make "among themselves many unlawful and unreasonable ordinances . . . for their own singular profit and to the common hurt and damage of the people." It is therefore rendered unlawful for any fellowship to make its by-laws without the approval of certain great judicial functionaries.²²⁰ The act was no mere threat. Discontented members could drag their officers before the court,²²¹ and many of the companies thought it valorous to be discreet and seek the ratification of what rules they had already.²²² Nor is it unimportant in this connection to note that the great Statute of Artificers took from the crafts their control over their servants.²²³ No man, surely, can have mistaken the implications of this policy. Were he so blind the dissolution of monasteries and chantries would have stricken him with sight.²²⁴

It is the strident voice of Coke which raps out an elegy on this early history.²²⁵ "A corporation aggregate of many," he said, "is invisible, immortal, and rests only in intendment and consideration of the law." From treason and outlaw and excommunication he deemed its nature to exclude it. Loyalty was a virtue of the mind to which it could make no pretension. It exists but *in abstracto*, so that it lies ready to the king's hands. They are precise words. "The King giveth and the King taketh away" is no inapt summary of their purport, though we who know the history of their future may well shrink from the addition of the wonted blessing. Two centuries were to elapse before the charge of high treason gave Thomas Kyd the leisure which he turned to service of corporate realism.²²⁶ Seventy years later England discovered a road more

²¹⁹ 15 HEN. VI, c. 6.

²²⁰ 19 HEN. VII, c. 7.

²²¹ WILLIAMS, HISTORY OF THE FOUNDERS' COMPANY, 13, 16.

²²² MILBOURNE, HIST. OF VINTNERS' COMPANY, 39.

²²³ 5 ELIZ. C. 4, §§ 4, 11, 14, 28.

²²⁴ 2 ASHLEY, *op. cit.*, 135.

²²⁵ The Case of Sutton's Hospital, 10 Coke Rep. 1 (1612).

²²⁶ The second volume of Kyd's work (1794) is actually dated from the Tower.

fitted to corporate travel.²²⁷ Within forty years, the greatest of English historians wrote large the epitaph of corporate fictions. The new theory of the state his words are making may yet prove his truest memorial.²²⁸

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²²⁷ COMPANIES' ACT, 25 & 26 VICT. c. 89.

²²⁸ Maitland's translation of, and introduction to, Gierke was published in 1900. Cf. Saleilles' impressive remarks in 23 L. QUART. REV. 139. I ought here to say that I have not discussed the relation of fictions to the concession theory because I am convinced that in order to do so at all adequately it is necessary to consider the history of the corporation to the end of the seventeenth century. I hope to deal with this subject in a later paper. Sir F. Pollock's essay in the GIERKE FESTSCHRIFT is, of course, our main authority on this head.